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IN THE

Supreme Court of the United States

Term, No. 149-150

CLAIR CONRAD,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,
Respondent.

PASQUALE DAMIANO,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Clair Conrad and Pasquale Damiano, by their attorneys, pray that writs of certiorari issue to review the judgments

of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cases on April 30, 1947.

OPINIONS BELOW.

The opinions of the U. S. District Court for the Eastern District of Pennsylvania and of the U. S. Circuit Court of Appeals for the Third Circuit have not yet been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on April 30, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U.S.C.A. Section 347 (a).

QUESTIONS PRESENTED.

1. Where an injured employee of an interstate railroad, without benefit of legal counsel, entered into a Pennsylvania Workmen's Compensation agreement prepared by the railroad, approved by the Compensation Board, and under which defendant railroad made payments, and where the employee was induced to enter into such agreement by the importuning of defendant and by its assurances that he had no other remedy, but discovered over three years after his injury, but within one year of the last compensation payment, that he had been entitled to relief under the Federal Employers' Liability Act, did not the Workmen's Compensation proceedings constitute commencement of an action within the meaning of Section 6 of the Federal Employers' Liability Act (45 U.S.C.A. 56)?

(*Answer below: No.*)

2. Under the recited circumstances, did not resort, by defendant railroad, to the agreement, with the purpose and effect of procuring the operation of the statute of limitations, so contravene Section 5 of the Federal Employers' Liability Act (45 U.S.C.A. 55) as to prevent defendant from invoking the statute of limitations?

(*Answer below: No.*)

STATUTES INVOLVED.

Sec. 6 of the Federal Employers' Liability Act (45 U.S.C.A. 56) provides:

> "No action shall be maintained under this Chapter unless commenced within three years from the day the cause of action accrued."

Sec. 5 of the Federal Employers' Liability Act (45 U.S.C.A. 55) provides in part:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall to that extent be void * * *"

STATEMENT OF FACTS.

The sole issue raised by these two companion cases, brought under the Federal Employers' Liability Act, is whether they are barred by the three-year statute of limitations (Sec. 6 of the Federal Employers' Liability Act, 45 U.S.C.A. 56). Conrad was injured in Pennsylvania, on October 12, 1941, while in the employ of the Pennsylvania Railroad Company, and suit was started on his behalf in the U. S. District Court for the Eastern District of Pennsylvania on June 12, 1946. Damiano was injured also while in the employ of the same railroad, on November 4, 1942, and his suit was started in the same Court on May 16, 1946. Both actions were dismissed by that Court on Defendant's motion, on the ground that they were barred by the statute of limitations.

Because both cases raised essentially the same issues, the District Court considered them together, and by stipulation of counsel, appeals to the Circuit Court of Appeals (Third Circuit) were consolidated.

In both cases, workmen's compensation proceedings were instituted shortly after the accident by the filing of workmen's compensation agreements with the Pennsylvania Workmen's Compensation Board. Although the agreements themselves or copies thereof were not before the District or Circuit Courts (having been omitted by plaintiffs from the pleadings because regarded by them as evidentiary), it may be gathered from an affidavit and a sworn statement, filed by Conrad and Damiano, respectively, and made part of the record, that the agreements were under the Pennsylvania Workmen's Compensation Act (June 21, 1939, P. L. 520, Secs. 1, et seq.). The motions to dismiss were heard on that theory by the District Court, as apparently was the appeal before the Circuit Court (see page 2 of Opinion of Circuit Court).

In the *Conrad* case, shortly after the accident, at the defendant's suggestion, in the absence of legal counsel to represent the plaintiff, and while plaintiff was in the hospital, plaintiff entered into a workmen's compensation agreement with the defendant (Conrad, R. 5. 6). Under Pennsylvania law all compensation agreements must be submitted to the Workmen's Compensation Board for approval (Act of 1915, June 2, P. L. 736, Sec. 409, as amended; 77 P. S. 733). Conrad entered into these proceedings before the Board in reliance upon defendant's implicit representation that the matter fell exclusively within State law (Conrad, R. 6). Later, defendant filed a petition with the Board to terminate compensation payments, but the hearing "was called off" (Conrad, R. 6).

In the *Damiano* case, shortly after plaintiff returned home from the hospital, and while he was still incapacitated, defendant's claim agent visited him and, in the absence of any legal counsel to represent Damiano, induced him to sign a

workmen's compensation agreement, despite protests by Damiano, by assuring him that "you are not signing anything bad; we have to send that in to Harrisburg and approve your compensation". (Damiano, R. 7, 8.) In Paragraph 13 of the Complaint, Damiano alleged, in effect, that he had been induced to enter into the agreement by the Defendant "either fraudulently or by mutual mistake of fact", on the premise that the State law was exclusively applicable.

Neither in the Conrad nor Damiano case did defendant tell or even intimate to plaintiff that he had any rights under the Federal Employers' Liability Act; on the contrary, both men were told that their only remedy was for compensation (Conrad, R. 6; Damiano, R. 8). In both cases, compensation payments were made to plaintiff within less than a year from the commencement of the Federal action, which each instituted promptly upon discovery of the applicability of Federal law. (Conrad, R. 6, Damiano, R. 8.)

In both cases, because three years had passed from the time of the injury until the starting of the Federal action, defendant moved to dismiss the action on the ground that it was barred by the statute of limitations. There appears to be no Pennsylvania statute or decision creating or regulating the right to transfer proceedings from the Workmen's Compensation Board to any other Court.

The lower Court granted the motions to dismiss. Conrad and Damiano each petition for certiorari, following affirmance by the U. S. Circuit Court of Appeals (Third Circuit) of the action of the District Court dismissing each action.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred in the following respects:

(1) In holding that the institution of Workmen's Compensation proceedings do not constitute "commencement" of an action within the meaning of Section 6 of the Federal Employers' Liability Act;

(2) In holding that the defendant railroad may invoke the statute of limitations notwithstanding petitioners' contention that they were lulled into inaction by the Workmen's Compensation agreement, procured by the railroad in violation of Section 5 of the Federal Employers' Liability Act;

(3) In failing to reverse the order of the District Court dismissing petitioners' complaints with prejudice.

REASON URGED FOR GRANTING OF WRIT.

(1) The decision of the U. S. Circuit Court of Appeals (Third Circuit) is inconsistent in principle with New York Central & Hudson Railroad Co. vs. Kinney, 260 U. S. 340 (1922).

(2) This appeal raises the question left open for future decision in Herb vs. Pitcairn, 325 U. S. 77, 79 (1945), as to whether an action would be barred by the statute of limita-

tions if State law made new or supplemental process necessary.

(3) This appeal raises for the first time in this Court the novel and important question whether the statute of limitations in Federal Employers' Liability cases is to be read with and be limited by Section 5 of the Act so as to permit tolling of the statute of limitations where the delay in suing results from an agreement fraudulently induced by defendant.

(4) Since no Pennsylvania statute or decision permits transfer of proceedings from the Workmen's Compensation Board to another Court having jurisdiction over Federal Employers' Liability claims, the decision below deprives railroad employees who are litigants in Pennsylvania of the benefits and protection of N. Y. Central & Hudson Railroad vs. Kinney, 260 U. S. 340 (1922), and Herb vs. Pitcairn, 325 U. S. 77 (1945), which are enjoyed by similar litigants in other States which authorize transfer of proceedings to tribunals having jurisdiction over Federal Employers' Liability claims.

BRIEF.

ARGUMENT.

I.

The initiation of workmen's compensation proceedings and defendant's payments thereunder tolled the statute of limitations.

It is not necessary, in order to "commence" an action and to toll the statute of limitations under the Federal Employers' Liability Act, that proceedings be instituted initially in a Federal court, or even that the proceedings purport to be brought under the Federal Employers' Liability Act. It is sufficient that proceedings *in any tribunal* be instituted to recover for the particular injury, albeit the proceedings be maintained under plaintiff's mistaken belief that State law is exclusively applicable.

Many Federal cases hold that even though a plaintiff mistakenly brings proceedings in a Federal court *under state law and without any reference to the Federal Employers' Liability Act or interstate commerce,* plaintiff may later—even after the statutory period from the time of the accident has elapsed—amend his complaint and proceed under the Federal Employers' Liability Act, notwithstanding Section 6 thereof.[1] Even when proceedings based exclusively

[1] MISSOURI, K. & T. R. CO. v. WULF, 226 U. S. 570, 33 S. Ct. 135 (1912); SEABOARD AIR LINE RY. v. RENN, 241 U.S. 290, 36 S. Ct., 567 (1915); SMITH v. ATL. COASTLINE RY. CO., 210 F. 761 (C.C.A. 4, 1913). In these cases, actions were instituted in a Federal District Court solely on the grounds of diversity of citizenship, and the right of action was based exclusively on state law. Amendments to the complaint were allowed after the statutory period in each case, and plaintiff was allowed to proceed under the Federal Employers' Liability Act.

on state law were started in a *state court*, it has been held that plaintiff may, even after the statutory period under the Federal Employers' Liability Act has run, abandon his action under state law and proceed under Federal law.[2]

In N. Y. CENTRAL & HUDSON R. R. CO. v. KINNEY, 260 U. S. 340 (1922), an action was brought *under state law in a state court*. It was not until after three trials and seven-and-one half years from the time action had been brought that the complaint was amended to state a cause of action under the Federal Employers' Liability Act. The Court held that Section 6 was not a bar, stating (at page 346):

> "Of course, an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied."

Under the decisions of this Court, it is settled that the theory of the original suit may be changed even after the running of the statute of limitations. Thus, in TILLER v. ATL. COAST LINE R. CO.,[3] in an action originally based exclusively on the Federal Employers' Liability Act, and therefore resting on proof of negligence, an amendment was permitted after the limitation period had expired, alleging violation of the Boiler Inspection Act, involving absolute liability.

In the instant case, not only were proceedings on the *agreement* started before a state tribunal (the Workmen's

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[2] ILL. CENTRAL RY. CO. v. VAMS, 140 La. 1, 72 So. 788 (1917), affirmed per curiam, 246 U.S. 652, 38 S. Ct. 344; KINNEY v. N. Y. CENTRAL & H.R.R. CO., 162 N.Y. Sup. 42, 98 Misc. Rep. 11 (1916), affirmed in 164 N.Y.S. 1098; BROOM v. SOUTHERN RY. IN MISS., 115 Miss. 493, 76 S. 525 (1917); CURTICE v. CHICAGO & N.W. R.R. CO., 162 Wis. 421, 156 N.W. 484 (1916). For many other similar cases see the authorities cited at page 425 of the CURTICE case, supra.

[3] 323 U.S. 574, 65 S. Ct. 421 (1945).

Compensation Board), but *payments* were actually made in both cases by the defendant in recognition of its liability, pursuant to agreements filed before that tribunal.[4] Furthermore, it is significant that whereas in all of the cases cited, supra, the *plaintiff* originally chose voluntarily to claim under State law, in this case the *defendant* railroad induced plaintiffs to believe that only state law was applicable.

It was the railroad which was responsible for instituting state rather than Federal proceedings. Here, the railroad induced plaintiffs' assent to compensation agreements at a time when plaintiffs were without the benefit of counsel, while they were still incapacitated and, in one case, while plaintiff was still in the hospital.

Under these circumstances, the defendant should not be heard to object to plaintiffs' failure to institute Federal proceedings rather than the State Workmen's Compensation proceedings, and to take refuge behind the Statute of Limitations instead of defending upon the merits.

Under the above cited authorities, it appears indisputable that if plaintiff had originally started proceedings in an ordinary state court of record, even though he might have initially relied exclusively upon state law, the tolling of the federal statutes of limitations could not be gainsaid. But, the learned Courts below questioned whether Workmen's Compensation proceedings may be regarded as "litigation," having the effect of tolling the statute. That view we earnestly submit is wholly erroneous.

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[4] It is noteworthy that under the Pennsylvania Workmen's Compensation Act "in cases of personal injury, all claims for compensation shall be forever barred, unless, within one year after the accident, the parties shall have **agreed** upon the compensation payable under this article; or unless, within one year after the accident, one of the parties shall have filed a petition * * *. Where, however, **payments** of compensation have been made in any case, **said limitations shall not take effect until the expiration of one year from the time of the making of the most recent payment** prior to date of filing such petition." (Act 1915, June 2, P.L. 736, Art. III, Sec. 315 as amended; 77 P.S. 602) (emphasis supplied). In other words, the Act provides that **either** an agreement **or** payments will toll the statute; and in point of fact, in the instant cases, there were **both** agreements **and** payments within one year of each federal suit.

It is true that a number of Pennsylvania cases (of which VIRTUE v. J. LEE PLUMMER, INC., et al., 111 Pa. Super. Ct. 476 (1934), 170 A. 443 cited by the Court below, is typical) have used language to the effect that Workmen's Compensation proceedings are not "litigation." *But in every single instance where that language has been used, it has been employed for the sole and exclusive purpose of holding that the procedure under the Workmen's Compensation Act is liberal and not to be governed by strict, common law rules of procedure and pleading.* Thus, in the VIRTUE case, itself, the *only* question was whether the procedure used by the plaintiff was proper when he filed, instead of an "original claim petition," one which he described as "a petition for review." The Court held that the petition would be considered as an "original" claim despite the pleading irregularity. It was in dealing with that *sole* problem that the Court said (at page 478):

> "It has many times been pointed out by the Supreme Court and this Court that a proceeding under the Workmen's Compensation Act is not 'litigation,' and *that established rules and principles of common law practice are not to be rigorously applied*: Gairt v. Curry Coal Min. Co., 272 Pa. 494, 498, 116 A. 382; Manley v. Lycoming Motors Corp., 83 Pa. Superior Ct. 173; Ratto v. Penna. Coal Co., 102 Pa. Superior Ct. 242, 247, 156 A. 749. The *courts take a liberal attitude toward pleadings in a compensation case and may consider a petition to reinstate as a petition to modify,* etc.: Higgins v. Com. C. & C. Co., 106 Pa. Superior Ct. 1, 161 A. 745." (Emphasis ours.)

From the context of the statement, it is clear that the Court intended to say no more than that liberal rules of procedure and pleading, more liberal perhaps than similar rules in common law courts, prevailed in Workmen's Compensation cases. The language of the VIRTUE case has been often repeated by Pennsylvania Courts, but *without excep-*

tion for the same, limited purpose of holding that procedure and pleading rules are to be applied liberally in Workmen's Compensation cases.

Thus viewed, the language of the VIRTUE case has no bearing whatsoever upon the problem of the instant cases. Even as restricted to the limited procedural context in which it was used, that language was nothing but a figure of speech, wholly unnecessary to the decision. For, if the mere applicability of liberal procedural and pleading rules serves to convert "litigation" into some nondescript matter, no. "litigation," then *mutatis mutandis,* actions in the federal courts, which by virtue of the new rules of procedure, are liberal by contrast with former rules, have likewise lost their "litigious" character. Under the circumstances, to accord to the loose language of the VIRTUE case any bearing upon the issue presented in the instant cases is to indulge in word worship with total disregard of substance.

The truth of the matter, of course, is that Workmen's Compensation proceedings, however liberal in *form,* are plainly "litigation" in adjudicating a multitude of disputes and controversies, between employers and employees, which before the advent of Workmen's Compensation acts were tried in the common law courts. Will it be suggested that what has always been acknowledged, historically, traditionally and intrinsically, as "litigation" can suddenly lose its litigious quality merely because the machinery for deciding the dispute is altered and liberalized? If Workmen's Compensation cases are not "litigation," why then do the appellate courts of Pennsylvania review decisions of the Workmen's Compensation Board? Is it not significant that in many states compensation cases are still adjudicated directly by ordinary courts of record? See a list of such states in SHORTZ v. FARRELL, 327 Pa. 81 at 87, 183 A. 20 (1937). And was not defendant, itself, "litigating," when it filed a petition against Conrad to terminate his compensation?

Despite the language in the VIRTUE and like cases, the Pennsylvania Supreme Court has acknowledged, as any reasonable mind must, that "proceedings in Workmen's Compensation cases are essentially of a judicial character." RICH HILL COAL CO. v. BASHORE, 334 Pa. 449, 499, 7 A. 2d 302 (1939); SHORTZ v. FARRELL, 327 Pa. 81, 193 A. 20 (1937). The latter case recognized not only that participation in Workmen's Compensation cases on behalf of another constitutes practice of law, but also that "even in compensation cases, the material findings must have a basis of *legal proof* on which to rest"; that "all findings of fact shall be based only upon *competent evidence*"; that "examinations and cross-examinations of witnesses require a knowledge of relevancy and materiality"; that "the application of the Workmen's Compensation Act frequently involves delicate problems of law and fact"; and that these "judicial" proceedings "were they transferred to a court room and carried on before a judge * * * involve the same fundamental characteristics of the determination of property rights and obligations of parties as do other judicial proceedings": SHORTZ v. FARRELL, supra, pp. 85-87 (Emphasis, the Court's.)

Workmen's Compensation proceedings have other indicia of litigation. "From the beginning of the hearing before the referee, a judicial record is made upon which the ultimate rights of the parties depend": SHORTZ v. FARRELL, supra, p. 88. And here, as in common law actions, is present one of the most important features of "litigation," namely, a conclusive adjudication, under the doctrine of *res judicata*.[5] Thus the determinations of state Workmen's Compensation Boards are conclusive and must be recog-

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[5] FLOWERS v. LIGGETT & MYERS TOBACCO CO., 145 Pa. Super. 230, 20 A.2d 856 (1941), and cases cited therein, at page 246 (1941); STOHAN v. ROCKHILL COAL CO., 140 Super. 146, 14 A.2d 229 (1940); HUHA v. FRICK COKE CO. 149 Pa. Super. 108, 27 A.2d 739 (1942); LANDRETH v. WABASH R. CO., 153 F.2d 98, cert. den. 328 U.S. 855, 66 S. Ct. 1345 (1946); SEMBLE, BRETSKY v. LEHIGH VALLEY R.R. CO., 156 F. 2d 594 (1946).

nized in other states: MAGNOLIA PETROLEUM CO. v. HUNT, 320 U. S. 430 (1943).

Finally, Workmen's Compensation cases, like any other cause of action, may be barred by the statute of limitations,—in Pennsylvania after one year, unless a petition or compensation agreement is filed within that time.[6] Since Workmen's Compensation proceedings are "litigation" for the purpose of the statute of limitations, when they are not timely commenced, it seems strained and anomalous to regard the same proceedings as not being "litigation" when they *are* seasonably started. If an employee's right to recover for personal injuries can be saved or barred by the commencement or failure to commence Workmen's Compensation proceedings, it must be because such proceedings are "litigation" for the purpose of the statute of limitations.

By whatever name Workmen's Compensation proceedings may be designated, one fact is incontrovertible. They are essentially the *sole* means today of adjudicating such issues between employers and employees in Pennsylvania. By starting such proceedings, plaintiffs have done fully as much to toll the statute as the plaintiff did in N. Y. CENTRAL & HUDSON R. R. v. KINNEY, 260 U. S. 340, supra, where he sued in a state court upon an exclusively state right and then, over seven years later, for the first time invoked the Federal Employers' Liability Act.

Nor is it of moment that the Workmen's Compensation proceedings were started here by the execution of a compensation *agreement*. A suit is no less litigious and conclusive because of its amicable origin. Decrees, orders and judgments are often entered by courts upon stipulation or agreement of the parties. They are no less judicial because of the agreement. Judgments entered by confession or on

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[6] See 77 P.S. 602; RATTO v. PA. COAL CO., 102 Pa. Super. 242, 156 A. 749 (1931); COSTENZA v. GENERAL BAKING CO., 147 Pa. Super. 591, 24 A.2d 735 (1942); SWEENEY v. READING CO., 146 Pa. Super. 32, 21 A.2d 468 aff'd 344 Pa. 561, 26 A.2d 199 (1942).

warrant of attorney likewise have all the attributes of judgments entered after trial.[7]

The significant circumstance here is that, under Pennsylvania law, all agreements for compensation, in order to be valid, must be approved by the Workmen's Compensation Board.[8] Such an agreement, properly approved, is as binding on the parties as an award rendered after hearings.[9] Moreover, the act specifically provides (Sec. 315-77 P. S. 602):

> "In cases of personal injury all claims for compensation shall be forever barred, unless in one year after the accident, the parties shall have agreed upon the compensation payable under this article, or unless in one year after the accident, one of the parties shall have filed a petition. * * * *Where,* however, *payments* of compensation *have been made in any case, said limitations shall not take effect until the expiration of one year from the time of the making of the most recent payment.* * * *" (Emphasis ours.)

It is obvious that the Act clearly stipulates that *an agreement of compensation will toll the statute of limitations no less than a petition. Moreover, payments will in any case also toll the statute.* The act makes no distinction between agreements for compensation and petitions, so far as the statute of limitations is concerned. In the instant cases, *there were both approved agreements and payments made thereunder within less than one year of the present actions.*

It is respectfully submitted, therefore, that despite the language of the VIRTUE case, Workmen's Compensation proceedings, including approved agreements for compen-

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[7] See Restate., Judgments, Section 47, comment a.

[8] Act of 1915, June 2, P.L. 736, Sec. 409 as amended 1939, June 21, P.L. 520 (77 P.S. 733); CEASE v. THOMAS, 155 Pa. Super. 215, 38 A. 2d 547 (1944).

[9] Semble, KILGORE v. STATE WORKMEN'S INS. FUND, 127 Pa. Super. 213, 193 A. 234 (1937).

sation, *are* "litigation" for the purpose of tolling statutes of limitation, and that the principle of the KINNEY case and like decisions is applicable here. This conclusion appears especially appropriate in view of the fact that it was the defendant, not the plaintiffs, who chose the particular forum.

It was merely a fortuitous circumstance that the forum open to the plaintiff in the KINNEY case had jurisdiction over actions for employees' injuries under state law and under the Federal Employers' Liability Act alike. The original theory of his suit was the same as that of plaintiffs in these cases,—state law. Plaintiff in the KINNEY case did no more to toll the "Federal" statutes of limitations than plaintiffs here. So long as they relied on Pennsylvania law, petitioners had no choice but to initiate Workmen's Compensation proceedings, for in Pennsylvania original jurisdiction of state common law courts, over such controversies, has been fully divested, and the remedy under the Workmen's Compensation Act made exclusive.[10]

Here, as much as in the KINNEY case, therefore, it is appropriate to state that:

> "* * * When a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist. * * *"

Respondents and the learned Court below suggest that since recovery of workmen's compensation is not dependent upon negligence, proceedings before the Workmen's Compensation Board do not point to the "specified conduct" or negligence upon which an action under the Federal Employers' Liability Act must rest. Accordingly, respondent

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[10] CAPETOLA v. BARCLAY WHITE CO., 139 F. 2d 556, affirming 48 F. Supp. 797, cert. den. 321 U.S., 799, 64 S. Ct. 939 (1944); VENEZIA v. PHILA. ELECTRIC CO. 317 Pa 557, 177 A. 25 (1935); MOFFETT v. HARVISON-WALKER REFRACTORIES CO., 339 Pa. 112 14 A.2d 111 (1940).

urged below that it "was never put upon notice that it was charged with negligent conduct, so that it might have had a reasonable opportunity to investigate the facts before more than three years had elapsed." Similarly, it was stressed below that TILLER v. ATLANTIC COASTLINE R. CO.[11] is distinguishable because defendant there had notice from the beginning of the "events leading up to" the death of plaintiff's decedent.

But defendant's claim of surprise cannot be real. For it is a notorious fact, of which the Court may well take judicial notice, that immediately upon the happening of an accident, trained railroad investigators and claim agents look thoroughly into every phase of the accident. Names and addresses of witnesses, statements, photographs, etc., are quickly garnered. Indeed, a Pennsylvania statute[12] specifically requires a report to be made, soon after every accident, to the Pennsylvania Department of Labor and Industry, setting forth, inter alia, the name, address, age, wage, and occupation of the injured party, the date, hour, place, *cause*, and character of the injuries, the probable duration of disability, etc. Similarly, an Act of Congress[13] requires every carrier to make monthly reports of all accidents, stating the "*nature and causes thereof*" and "*circumstances connected therewith.*"

It seems inconceivable, therefore, that when the Workmen's Compensation proceedings were started in these cases the defendant railroad could possibly have ignored the "specified conduct" which was the foundation of workmen's compensation proceedings or a Federal Employers' Liability action, alike. In any event, in view of petitioners' charge that the workmen's compensation agreements were fraudu-

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[11] 323 U.S. 574, 65 S. Ct. 421 (1945).

[12] Act of 1913, July 19, P.L. 843, Sec. 1; 1937, March 10, P.L. 56 Sec. 1; 43 P.S. 12.

[13] Act of May 6, 1910 c. 208, Sec. 1, 36 Stat. 350, 45 U.S.C.A. 38.

lently[14] induced, defendant's full knowledge of the "specified conduct" may well be presumed for the purpose of the motions to dismiss.

It is true that in the KINNEY case, the original suit, although based on State law, was started in a state court having jurisdiction also over Federal Employers' Liability cases. And it is also true that in HERB v. PITCAIRN,[15] in holding the statute of limitations inapplicable to an action transferrable to another State court having jurisdiction (although originally started in a State court having no jurisdiction), this Court carefully observed that no opinion was being expressed as to "whether the action would be barred if state law made new or supplemental process necessary." The question there reserved or left open, is raised here. Certainly, HERB v. PITCAIRN does not foreclose the present actions.

Should plaintiffs in these cases be penalized and put in a less favored position than the plaintiff in the KINNEY case merely because of the fortuitous circumstance, over which no plaintiff could have any control, that a different state forum was provided originally in the KINNEY case than in Pennsylvania? So far as conduct of the plaintiffs, themselves, is concerned, plaintiffs here have done as much to toll the statute as the plaintiff in the KINNEY case.

The right to recover under the Federal Employers' Liability Act derives from an Act of Congress. The fact that a State does or does not provide for transfer of proceedings from one of its courts to another should not be determinative of the existence of a right to recover under a Federal statute. Moreover, the rights of railroad employees under

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[14] While the pleadings used the words "either fraudulently or by a mutual mistake of fact", under Rule 8e of the Federal Rules, alternative pleading is permissible; if one of the alternatives would be sufficient if made independently, the pleading is not rendered insufficient because of the insufficiency of the other alternative.

[15] 325 U.S. 77, 65 S. Ct. 954 (1945).

the Federal Employers' Liability Act should be uniform[16] throughout the country, and should not depend upon the fortuitous circumstance that, initially, the proceedings were brought in one State rather than in another. In short, it is submitted that the principle of the KINNEY case should be available to every employee under the Federal Employers' Liability Act, irrespective of whether the original tribunal accidentally happens to have jurisdiction over both state and federal causes and may therefore permit amendment of the original complaint, or whether state law authorizes the transfer of proceedings from one tribunal to another, as in HERB v. PITCAIRN, or whether the technicality of new or supplemental process is necessary. It should suffice that proceedings *in any tribunal* were instituted, so long as defendant was apprised from the beginning of the general basis for plaintiff's demand.

It is respectfully urged, therefore, that the institution of workmen's compensation proceedings, in these cases constituted commencement of an action and tolled the statute of limitation.

II.

DISMISSAL OF THESE SUITS WOULD PERMIT DEFENDANT TO VIOLATE SECTION 5 OF THE FEDERAL EMPLOYERS' LIABILITY ACT.

Section 5 of the Federal Employers' Liability Act (45 U. S. C. A. 55) provides that:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability

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[16] The Federal Employers' Liability Act "establishes a rule or regulation which is intended to operate uniformly in all the states . . .": N. Y. Central & H.R. Railroad Co. v. Tonsellito, 244 U.S. 360, 361 (1916); Erie Railroad Co. v. Winfield, 244 U.S. 170, 172 (1916);

created by this chapter, shall to that extent be void. * * *"

It is submitted that this provision debars defendant from entering into any agreement with plaintiff which would restrict plaintiff's rights, under the Federal Employers' Liability Act, including an agreement under which plaintiff might waive his right to sue until after the statutory period. It is noteworthy that, while defendant does not directly rely upon its compensation agreement with plaintiff, in point of fact, if defendant is sustained in its reliance upon the statute of limitation, it would thereby be permitted, indirectly, to circumvent the purpose and objective of this Section of the Federal Employers' Liability Act. For, it was only because of their induced reliance upon this agreement with defendant that plaintiffs were lulled into the belief that Federal law was inapplicable and unavailable.

The view of the learned Circuit Court, that the effect of Section 5, if applicable, would be simply to void the compensation agreements, but not to toll the statute of limitation renders Section 5 wholly nugatory. Claim agents of defendant railroads are thus encouraged to resort to fraudulent devices calculated to delay actions until the running of the statute of limitations.

Respondents and the Circuit Court opinion suggest that in 1941 at the time of these workmen's compensation agreements, there was great uncertainty as to whether these cases arose out of interstate commerce or were intra-state and governed by state law. Assuming, pro arguendo, the existence of such uncertainty, it did not warrant defendant's flat and unequivocal assurance to petitioners that state law was definitely their exclusive remedy. In any event the record shows an averment of fraud[17] in the pleadings, raising at least a jury issue as to its presence, and foreclosing, for the purpose of the motions to dismiss any argument or presumption of *innocent* misrepresentation by defendant.

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[17] See Footnote 14.

The U. S. Supreme Court has never held or even directly stated that the statute of limitations in *Federal Employers' Liability cases* cannot be tolled for fraud or concealment. Only a few dicta in lower Federal courts,[18] have so suggested, and in none of those was the effect of Section 5 upon the statute of limitations raised or considered. In none of the Federal Employers' Liability decisions of this Court, cited in the opinion of the Circuit Court, was there any claim of fraud involved. This Court has never before considered the question whether, under Section 5, fraud may toll the statute of limitation. All the other cases cited in the opinion below involved other statutes of limitation, not pertaining to Federal Employers' Liability cases, and not limited or qualified by any provisions corresponding to the said Section 5.

Congress, when it enacted Section 5, laid down a mandate to all Courts trying cases under the Federal Employers' Liability Act, to the effect that no employee shall, by any legal technicality or contractual device, be deprived of the rights provided by this Act. Petitioners respectfully contend that Section 6 (the Statute of Limitations) must be read together with Section 5. In other words, all defenses to actions under the Federal Employers' Liability Act, even if otherwise available, must be "screened" through this Section 5 in order to be sustained, and Section 6, fixing a statute of limitations, even if it were otherwise applicable, must be read in the light of Section 5.

In principle, the present cases are not unlike DUNCAN v. THOMPSON, 315 U. S. 1 (1942). There, a railroad employee was injured, and the railroad obtained the employee's signature to a contract under which he agreed to negotiate and to attempt to settle the claim. For this he was paid $600.00. The contract provided that the employee, in order to bring suit, had to repay the $600.00. He sued, notwithstanding this provision and his failure to repay the money. The Court held the agreement void under

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[18] See Bell vs. Wabash Ry. Co., 58 F. 2d 569, 572 (C.C.A. 8, 1932).

Section 5 of the Act, since, if valid, it would have exempted the railroad from liability.

In SHERMAN v. PERE MARQUETTE RY. CO., 62 F. Supp. 590 (1945), Section 5 was held to invalidate an agreement, between the defendant railroad and its injured employee, under which the latter had agreed not to sue the railroad anywhere but in the state where the injuries occurred. Similarly, in ERIE R. CO. v. MARGUE, 23 F. 2d 664 (1928), defendant railroad was held barred by Section 5 from evading liability under the Federal Employers' Liability Act by delegating its responsibilities to independent contractors who would be liable to workmen only under state laws.

CONCLUSION.

It is respectfully urged that defendant should not be permitted to avail itself of the defense of the statute of limitations, first, because, under the cases, the proceedings before the State Workmen's Compensation Board, especially since prompted by the defendant itself, should be regarded as the commencement of an action, tolling the statute of limitations and, second, because allowance of the defense of statute of limitations would enable defendant to defeat and nullify the purpose of Section 5 of the Act.

Respectfully submitted,

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Attorneys for Petitioners.

FILED

Supreme

No. 149.

CLAIR CONRAD (Plaintiff-Appellee in the Court

v.

PENNSYLVANIA RAILROAD COMPANY, (Defendant-Appellee in the Court below),

Respondent.

No. 150.

PASQUALE DAMIANO (Plaintiff-Appellee in the Court below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY, (Defendant-Appellee in the Court below),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947.

No. 149.

CLAIR CONRAD (PLAINTIFF-APPELLANT IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (DEFENDANT-APPELLEE IN THE COURT BELOW),

Respondent.

No. 150.

PASQUALE DAMIANO (PLAINTIFF-APPELLANT IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (DEFENDANT-APPELLEE IN THE COURT BELOW),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (Conrad R. 12) is reported in 161 F. (2d) 534. The opinion of the District Court (Conrad R. 7a) is not reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Question Presented.

In each of these cases the petitioner instituted a suit in the United States District Court under the Federal Employers' Liability Act on an alleged cause of action that admittedly accrued more than three years before the date upon which the action was instituted. The question presented in each case is whether the prior execution by the petitioner of a voluntary compensation agreement under the provisions of the Pennsylvania Workmen's Compensation Act, which does not require proof of negligence, and the receipt by petitioner of payments under the agreement, suspended or tolled the operation of Section 6 of the Federal Employers' Liability Act which provides that no action shall be maintained under the statute unless commenced within three years from the day the cause of action accrued.

Statute Involved.

Section 6 of the Federal Employers' Liability Act provides (45 U. S. C. 56):

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." • • •

Statement.

The petitioner, Conrad, brought a suit in the United States District Court for the Eastern District of Pennsylvania on June 12, 1946 under the Federal Employers' Liability Act to recover for injuries alleged to have been incurred on October 12, 1941 while the petitioner was in the employ of the respondent.

Petitioner, Damiano, brought a similar suit in the same court on May 16, 1946 under the Federal Employers' Liability Act to recover for injuries alleged to have been incurred on November 4, 1942 while the petitioner was in the employ of the respondent.

Neither petitioner instituted adverse proceedings under the Pennsylvania Workmen's Compensation Act, but each petitioner, some time within a year from the date on which his injuries occurred, executed a separate agreement with the respondent for payment of compensation. Copies of these agreements were never produced or incorporated in the record. Two months after respondent's motion to dismiss had been filed an ex parte affidavit of petitioner Conrad (Conrad R. 5a), containing statements with respect to his agreement, was filed with the District Court. Two weeks after respondent's motion to dismiss had been filed an ex parte question and answer statement of petitioner Damiano (Damiano R. 6a), referring to his agreement, was filed with the District Court.

Both cases were heard by the District Court and the Circuit Court of Appeals on the theory that the compensation agreements were made under, and in compliance with, the Pennsylvania Workmen's Compensation Act.

Payments were made by respondent to petitioner Conrad for an unstated period. The respondent also made payments to petitioner Damiano until after he brought suit under the Federal Employers' Liability Act. It may be assumed that these payments were made under the compensation agreements although this fact is not affirmatively shown by the record.

In his complaint, the petitioner, Damiano, alleged in the alternative that he was induced to enter into the compensation agreement "either fraudulently or by a mutual mistake of fact." The petitioner, Conrad, made no such allegation and in his case the issue of fraud was never raised in the courts below.

In the District Court the respondent moved to dismiss each suit on the ground that it had been commenced more than three years after the cause of the action accrued. The District Court granted the motion in both cases and its judgments were affirmed by the Circuit Court of Appeals for the Third Circuit.

ARGUMENT.

I. The Petitioners' Right to Sue Under the Federal Employers' Liability Act Has Been Extinguished by Section 6 of the Act.

In each of the cases presented, the petitioner's right of action arose under the provisions of the Federal Employers' Liability Act, c. 149 of the Act of April 22, 1908, 35 Stat. 65, as amended, (45 U. S. C. A. § 51 et seq.), more than three years before any suit was started.

Section 6 of the Act (45 U. S. C. A. § 56) provides that

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

It is submitted that the District Court was correct in dismissing these complaints on the ground that the requirement of Section 6 is more than a mere statute of limitations pertaining to the remedy and that compliance with this requirement is a condition precedent to the employee's right of action. As briefly stated by Mr. Justice Holmes in *Flynn v. N. Y., N. H. & H. R. R. Co.*, 283 U. S. 53, 56 (1931):

> "The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, *Engel v. Davenport*, 271 U. S. 33, 38, and the same consequence follows."

In *Engel v. Davenport et al.*, 271 U. S. 33, 38 (1926), in referring to Section 6, the Court said:

> "This provision is one of substantive right, setting a limit to the existence of the obligation which the Act creates."

Neither fraud nor other circumstances which might toll an ordinary statute of limitations is applicable. *Bell v. Wabash Ry. Co.*, 58 F. (2d) 569 (C. C. A. 8th 1932). Nor

does the fact that the cases here cited deal with the two year limitation imposed by Section 6 prior to the 1939 amendment weaken in any way their authority for the principle stated.

Thus lapse of time itself destroys any liability of the employer, since commencement of an action within the three year period prescribed by the act is a prerequisite to the exercise of any rights under the act, and constitutes a limitation of such rights. The Federal Employers' Liability Act established a new right in derogation of the common law and thus created nothing which could extend in time beyond the period of its own express limitation. As was said by Chief Justice Waite in *The Harrisburg,* 119 U. S. 199, 214 (1886), when speaking of a state act granting a right to bring actions for loss of life within one year thereof:

> "The statutes create a new legal liability, with a right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

It is therefore misleading and erroneous to say, as petitioners do on pages 16 and 17 of their brief, that the execution of workmen's compensation agreements under state law "tolled" the statute of limitations. As above indicated, the express limitation imposed by Section 6 cannot be "tolled" even on account of fraud or other circumstances which might toll an ordinary statute of limitations. *Bell v. Wabash Ry. Co.,* 58 F. (2d) 569 (C. C. A. 8th 1932), supra, and compare *Pollen v. Ford Instrument Co. Inc.,* 108 F. (2d) 762, 763 (C. C. A. 2nd 1940) and *U. S. ex rel. Nitkey v. Dawes,* 151 F. (2d) 639, 644 (C. C. A. 7th 1945), cert. den. 327 U. S. 788 (1945). Unless each action was "commenced

within three years from the day the cause of action accrued", any right given petitioners by the Federal Employers' Liability Act to sue for the injuries now complained of simply ceased to exist; and since both actions now before the Court were brought more than three years after the respective causes of action accrued, the District Court could not properly have done otherwise than grant respondent's motions to dismiss.

II. The Voluntary Compensation Agreements Do Not Suspend the Operation of Section 6.

The voluntary compensation agreements entered into between the respective petitioners and respondent, even if made in strict conformity with the applicable Pennsylvania law, did not constitute the commencement of an action under the Federal Employers' Liability Act, or the commencement of any action which might later be transformed into an action under the Federal Employers' Liability Act.

In their statement of Questions Presented, petitioners have assumed that the agreements referred to in Conrad's affidavit and in Damiano's sworn statement not only were compensation agreements entered into under the Pennsylvania Workmen's Compensation Act but also were approved by the Pennsylvania Workmen's Compensation Board, and have so stated on page 16 of their brief. There is nothing in the record, however, to show that either is true. No copies of the agreements in question were ever produced or otherwise incorporated in the record and there is nothing to show any of the terms of the agreements or that the payments referred to were actually made under them. However, respondent is willing to accept, for the purposes of this argument, petitioners' assumption that the agreements were entered into in strict accordance with the provisions of the state workmen's compensation law, that they were approved by the Board and that the payments to the petitioners were made thereunder. It is clear, however, that

the execution of such agreements could not possibly constitute the commencement of actions under the Federal Employers' Liability Act nor could they be "amended" in any way so as to permit original complaints, based upon causes of action under that act and filed after the statutory period had run, to relate back to the dates when the agreements were executed and make those the dates when the respective actions were first commenced.

Petitioners seek to avoid the effect of Section 6 first by invoking the aid of a number of cases which have held that a plaintiff who had filed his complaint within the statutory period either in a State Court or in a Federal Court whose jurisdiction was based solely upon diversity of citizenship, could amend, after that period had passed, to plead employment in interstate commerce and thus bring himself within the coverage of the federal act, and secondly by extending the recent holding of this court in *Herb v. Pitcairn,* 325 U. S. 77 (1945), to apply to the facts of the present case.

The cases cited by petitioners on this point are not controlling here for two reasons. In the first place, each of those cases was concerned with an *amendment* of an original complaint which had been filed within the statutory period in a court of jurisdiction competent to render a final judgment in an action under the Federal Employers' Liability Act, except the case of *Herb. v. Pitcairn,* 325 U. S. 77, which, under the state practice, could be and was transferred to such a court. In the cases at bar there is no suggestion that the so-called compensation agreements might be *amended* to state a cause of action against the railroad under the federal act or under any other act. The complaints here involved are not and do not purport to be amendments. They are the means by which new actions were commenced by new processes, on new causes of action, in an entirely new forum, and well beyond the three-year period permitted by the act.

Secondly, the cases relied on by petitioners involved an original complaint which charged the defendant with negligent action as the basis of liability, so that the subsequent amendment asserting the same right of recovery under federal instead of state law was considered to be a change merely of form and not of substance, and therefore not the introduction of a new cause of action. In the *Kinney* case, cited on page 10 of petitioners' brief, the New York Supreme Court put the basic reason for its ruling in the following words (162 N. Y. S. 42, 47):

> "In the case at bar the action was commenced concededly within two years after it accrued. Action was, therefore, brought *on the basic cause of action for negligence,* and the only cause of action that the plaintiff ever had." (Emphasis supplied.)

The other cases cited are essentially to the same effect. See *Seaboard Airline Railway v. Renn,* 241 U. S. 290, 294 (1916).

The distinction between such cases and each of the present ones is obvious when one considers the nature of the Pennsylvania Workmen's Compensation Act. The general section covering acceptance of the act provides that, where employee and employer agree to elective compensation, "compensation for personal injury to, or for the death of such employe, by an accident, in the course of his employment, shall be paid in all cases by the employer, *without regard to negligence,* according to" a schedule of values fixed by the act. Laws of Pennsylvania, Act of June 2, 1915, P. L. 736, Art. III, Par. 301, as amended (77 Purdon's Statutes 431). (Emphasis supplied.) The execution and filing of a voluntary compensation agreement between an employee and an employer is an admission only that an injury was sustained by the employee in the course of his employment. The agreements in the present cases can mean no more nor have any greater significance or effect. The respondent here may have admitted obligations under the Pennsylvania Workmen's Compensation Act, but cer-

tainly it cannot be said to have admitted any liability, or even the existence of any claim for liability, *based upon negligence,* since none was charged. In fact, that element had been excluded by the provisions of the Pennsylvania act.

The execution of a voluntary compensation agreement under the provisions of the Workmen's Compensation Act of Pennsylvania cannot possibly constitute the commencement of an action or suit of any kind, and most particularly not one based upon the employer's negligence, nor can such an agreement be amended in any way by a later complaint in another forum which states a cause of action *only* because of respondent's alleged negligence. In the present cases the respondent was never put upon notice that it was charged with negligent conduct, so that it might have had a reasonable opportunity to investigate the facts before more than three years had elapsed, and the general statements, made on page 18 of petitioners' brief, with reference to investigations made of accidents, not only have no support in the record but, in respect of compensation cases, are absolutely untrue.

In *New York Central R. R. v. Kinney,* relied upon by petitioners, it is apparent from the portion of the opinion quoted on page 17 of their brief that the Court felt that Section 6 was inapplicable because (260 U. S. 340, 346):

> "defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it *because of specified conduct,* . . ." (Emphasis supplied.)

Also on page 17 of the petitioners' brief appears a serious misstatement, which, however, indicates the fundamental misconception which is the basis of petitioners' argument. It is there stated that in the *Kinney* case and in the two cases now before the Court, "the original theory of his suit was the same." In the *Kinney* case, both the original and the final theory was negligent conduct on the part of the defendant. In the present cases, the original

theory was not negligent conduct on the part of the respondent, but merely an accident in the course of employment without regard to petitioner's negligence. In other words, "specified conduct" was not involved. The present theory, however, is negligent conduct of the respondent and no negligence on the part of the petitioners. State law was not a "theory of the suit" in either case. State law merely provided the remedy, which was entirely adequate if properly invoked. Thus the petitioners' argument completely overlooks the distinction between the railroad company's liability for negligence under the Federal Employers' Liability Act and the absolute liability under Workmen's Compensation Acts, which was recently noticed by this Court in the case of *Myers v. Reading Co.*, 67 S. Ct. 1334,—U. S.—(1947).

In *Tiller v. Atlantic Coastline Railroad Co.*, also relied on by petitioners, the Court found no reason for applying a statute of limitations for the purpose of barring a proposed amendment, where the defendant had "had notice from the beginning that petitioner was trying to enforce a claim against it *because of events leading up to*" the death of plaintiff's decedent. 323 U. S. 574, 581. (Emphasis supplied.) In the present cases, the compensation agreements gave respondent no warning or notice whatsoever that it would be subsequently charged with liability for negligent conduct. Nor could they, by any stretch of the imagination, be considered as commencing a proceeding in a forum competent to entertain and adjudicate a claim under the Federal Employers' Liability Act.

It is, moreover, idle for petitioners to assert that it is a mere fortuitous circumstance that a different state forum was provided for Kinney than Pennsylvania provided for petitioners, or that they did as much by merely signing a voluntary compensation agreement as Kinney did by bringing a suit in a court of general jurisdiction. Kinney was seeking to collect as much as a jury would give him in an action based on a claim of negligent conduct. The peti-

tioners made no assertion of negligence, nor did they allege any fault on the part of respondent, and were seeking merely the compensation allowed them by the state act. Actually, they did not even initiate a proceeding before the Workmen's Compensation Board but, under the assumed facts, merely entered into voluntary agreements as authorized by the Workmen's Compensation Act to avoid the necessity of filing a claim petition or otherwise initiating proceedings under that act. It would have been no different, however, if they had filed petitions in adverse proceedings under the State Compensation Act, since, as admitted by petitioners on page 6 of their brief, there is no way in which a proceeding commenced in Pennsylvania under the Workmen's Compensation Act can be transferred for any purpose to any other court.

Herb v. Pitcairn, 325 U. S. 77 (1945), is likewise not controlling here. This is apparent from the language of the Court at page 78.

> ". . . An action is 'commenced' for these purposes as a matter of federal law when instituted by service of process issued out of a state court, even if one which itself is unable to proceed to judgment, if the state law or practice directs or permits the transfer through change of venue or otherwise to a court which does have jurisdiction to hear, try and otherwise determine that cause. Whether the action would be barred if state law made new or supplemental process necessary is a question not involved here and not decided. . . ."

In the present cases, there has never been any process of any kind, but merely agreements for compensation entered into without any proceedings at all. However, petitioners would be in no better position if they had instituted proceedings under the State Compensation Act and their right to compensation had been resisted by respondent. If, after the three year period had expired, the petitioners had decided, as they did here, to claim a right to recover under the Federal Employers' Liability Act be-

cause of the respondent's negligence and had applied to the State Compensation Board to transfer the proceedings to a state or a federal court, the State Board would have had no power to do so. Here there was not even a pretense of a transfer, but the initiation of an entirely new suit in the federal court without reference to the prior compensation agreements, and also without reference to any prior proceedings before the Compensation Board, because there were none. If there had been such proceedings, they could no more have been transferred to the District Court and been metamorphosed into a suit under the Federal Employers' Liability Act than could a proceeding of any kind in the District Court have been transferred to the State Compensation Board and become there a proceeding under the State Compensation Act, whatever it may have been called when commenced in the District Court.

It is not true, as stated on pages 9 and 20 of petitioners' brief, that proceedings "in any tribunal" may be considered the commencement of an action under which a claim under the Federal Employers' Liability Act may be asserted. In Pennsylvania, an action commenced before a magistrate or a justice of the peace cannot be transferred to another competent tribunal, if the magistrate or justice of the peace is found not to have jurisdiction. See *Deihm v. Snell,* 119 Pa. 316, 13 Atl. 283 (1888), and *Birkhead v. Ward,* 35 Pa. Super. Ct. 235 (1908). Similarly, the State Compensation Board could not entertain a proceeding based on any ground not furnished by the State Compensation Act, nor could it transfer any such action to any other tribunal. As in the federal courts, a suit of which the tribunal has no jurisdiction must be dimsissed, *Hegler v. Faulkner,* 127 U. S. 482 (1888), in the absence of specific statutory authority for its transfer to another forum. There is therefore no foundation whatever for the petitioners' argument that the mere execution of a compensation agreement, in accordance with the provisions of the state act, gave the petitioners the right to ignore the three year lim-

itation in the Federal Employers' Liability Act, and bring a new suit in the federal court after that period had expired.

On page 16 of their brief, petitioners seem to argue that the one year period of limitation under the state compensation act may in some fashion be incorporated in the Federal Employers' Liability Act, so as to permit a suit under the latter act within one year after the payment of compensation under the state act, no matter how many years may have elapsed since the accrual of the cause of action. It is believed that such an argument requires no answer.

Apparently in order to make their cases appear as if there had been adverse proceedings initiated under the state compensation act, petitioners devote several pages of their brief to an attempt to show that the appellate courts of Pennsylvania did not mean what they said in *Gairt v. Curry Coal Min. Co.*, 272 Pa. 494, 116 Atl. 382 (1922), and in *Virtue v. J. Lee Plumber, Inc.*, 111 Pa. Super. Ct. 476, 170 Atl. 443 (1934), to the effect that workmen's compensation proceedings are not litigation. Whether they are or not, they clearly are not such litigation as can be transformed into a suit in the federal court under the Federal Employers' Liability Act, even if such a course had been attempted by the petitioners instead of that, which they actually followed, of ignoring all that had gone before and commencing an entirely new action in the federal court.

III. Section 5 of the Federal Employers' Liability Act Has No Application to the Present Case.

Section 5 of the Federal Employers' Liability Act provides (45 U. S. C. A. 55):

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void." • • •

The Section has no application in the present case even if it be assumed, as petitioners have suggested, that the respondent entered into the agreements with intent to avoid its obligations under the Federal statute. The respondent is not relying upon the compensation agreements as a bar to petitioners' actions. The respondent contends that the petitioners cannot maintain these actions because they were not commenced within three years from the day the causes of action accrued. It is the petitioners, and not the respondent, who have brought the agreements into the case by arguing that the agreements should be regarded as if they in effect commenced this action. In this respect, these cases are different from *Duncan v. Thompson*, 315 U. S. 1, cited by petitioners. In that case the defendant railroad relied upon the agreement as a bar to an action for personal injuries.

As the Circuit Court of Appeals pointed out, 161 F. (2d) 534, 537, if it should be assumed that the provisions of Section 5 are applicable to the compensation agreements, the only possible consequence would be to make the agreements void. Section 5 does not purport to limit or to qualify in any way the force or effect of Section 6. Section 5, therefore, cannot revive petitioners' alleged rights of action under the Federal Employers' Liability Act. Those rights have long since been extinguished because of the failure of petitioners to bring their actions within three years of the date on which the alleged cause of action accrued. The fallacy of the petitioners' arguments with respect to Section 5 appears from the fact that compensation agreements do not purport to affect in any way the petitioners' rights under the Federal Employers' Liability Act. Without in any way violating the compensation agreements, petitioners could at any time within the three year period have brought their actions under the Federal statute. There was nothing in the compensation agreements which enabled the respondent to exempt itself from liability under the Federal statute. Respondent's liability under that

statute remained unaffected until it expired three years after the alleged causes of action had accrued.

The allegations of the pleadings do not support the arguments with respect to fraud that are made in the petitioners' brief. In his complaint, petitioner Conrad did not allege that he had been induced to enter into the compensation agreement by fraud and, accordingly, the issue of fraud cannot be raised in that case. In his complaint, petitioner Damiano alleged that he had been induced to enter into the agreement by the defendant "either fraudulently or by a mutual mistake of fact." Apart from the question of the technical sufficiency of this form of pleading, the fact that the allegation is made in the alternative suggests that the emphasis now given to the allegation of fraud is an afterthought. Even if pleading in the alternative form is permissible, the general allegation of fraud, unsupported by any specific allegations to give it content, is not adequate to support the arguments now made in the petitioners' brief.

Petitioners and their present counsel are fully aware that in 1941, when these compensation agreements were voluntarily executed, not only the respondent, but petitioners, their union advisors and attorneys were uncertain whether employment such as that in which petitioners were engaged would be held to be interstate in character, so as to afford petitioners the benefit of the Federal Employers' Liability Act.

Furthermore, even had the respondent suspected or known that petitioners were entitled to sue under the Federal act, it was under no duty to give them legal advice, nor can its failure to impart any knowledge or opinion that it may have had, excuse petitioners' failure to comply with the specific requirement of Section 6 of the act. See *Bell v. Wabash Ry. Co.,* 58 F. (2d) 569, supra; *Wichita Falls and So. R. R. Co. v. Durham,* 132 Tex. 143, 120 S. W. 2d 803 (Tex. 1938).

Conclusion.

It is respectfully submitted, therefore, that the petitions for certiorari should be denied.

Respectfully submitted,

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